Supreme Court, U.S.
FILED

961005 NOV 4 1996

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JACQUELINE J. MONTVILLE, *petitioner*

v.

STAN LEWIS, KEITH SETCHELL, LANCE FARRIS, individually and in their official capacities as building inspectors/code enforcement officers, et. al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI

Lawrence Schlam
Attorney at Law
NIU College of Law
DeKalb, IL 60115
(815)753-0140
Counsel for Petitioner

61 pp

QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals erred in holding that building inspectors were entitled to qualified immunity for an administrative search of a private home based on the third-party consent of a workman who was not authorized to give such consent, and whether the search lacked sufficient probable cause to meet the requirements of the Fourth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT	2
A. Background	2
B. Proceedings Below	5
REASONS FOR GRANTING THE PETITION	6
I. The Court of Appeals for the Seventh Circuit, in misinterpreting established case law, erred in finding that building inspectors were entitled to qualified immunity from personal liability for their search of the plaintiff's home based on the third-party consent of a contractor who was not authorized to give such consent	7
A. Fourth Amendment Applicability	7
B. Third-Party Consent	10
C. Duty to Inquire Further	15
D. Applicability of Analogous Law	17
II. No probable cause existed for Defendants to enter Plaintiff's home, either because of exigent circumstances or pursuant to a valid ordinance	19
CONCLUSION	23
APPENDIX A	1a
APPENDIX B	1b

TABLE OF AUTHORITIES

Cases

Anderson v. Creighton, 483 U.S. 635 (1987).....9
Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967).....passim
Arizona v. Hicks, 480 U.S. 321 (1987).....20
Artes-Roy v. City of Aspen, 31 F.3d 958 (10th Cir. 1994).....20
Chapman v. United States, 365 U.S. 610 (1961).....12
Dow Chemical v. United States, 749 F.2d 307 (6th Cir. 1984).....10
Hester v. United States, 265 U.S. 57 (1924).....20
Illinois v. Rodriguez, 497 U.S. 177 (1990).....passim
Katz v. United States, 389 U.S. 347 (1967).....9
Kernats v. O'Sullivan, 35 F.3d 1171 (7th Cir. 1994).....19
Lojuk v. Johnson, 770 F.2d. 619 (7th Cir. 1985).....19
Marshall v. Barlow's, 436 U.S. 307 (1978).....10, 22
McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992).....17
Michigan v. Clifford, 464 U.S. 287 (1984).....10
Michigan v. Tyler, 436 U.S. 499 (1978).....9, 10, 22
Murray v. United States, 487 U.S. 533 (1988).....21
O'Connor v. Ortega, 480 U.S. 709 (1987) 13
Payton v. New York, 445 U.S. 573 (1980).....7
People v. Bessler, 191 Ill. App. 3d (1990).....21
People v. Flagg, 217 Ill. App. 3d 655 (1991).....16
People v. Keith M., 255 Ill. App. 3d 1071 (1993).....14

People v. Kramer, 204 Ill. App. 3d 10
(1990).....14, 16
People v. Speer, 184 Ill. App. 3d 730 (1989).....12
People v. Steinberg, 260 Ill. App. 3d 365 (1994).....11
Rice v. Burks, 999 F.2d 1172 (7th Cir. 1993).....19
Schneckloth v. Bustamonte, 412 U.S. 218 (1973).....10
Schaill by Kross v. Tippecanoe County School Corp.,
864 F.2d 1309 (7th Cir. 1988).....13
Silverthorne Lumber Co. v. United States, 251 U.S.
385 (1921).....21
Stoner v. California, 376 U.S. 483 (1964).....11
United States v. Baswell, 792 F. 2d 755 (8th
Cir. 1986).....12
United States v. Bensinger, 489 F.2d 865 (7th
Cir. 1973).....20
United States v. Estrada, 962 F.2d 733 (7th
Cir. 1992).....14, 16, 17
United States v. Harnae, 662 F. Supp. 766
(D. Colo. 1987).....12
United States v. Jeffers, 342 U.S. 48 (1951).....11
United States v. Karo, 468 U.S. 705 (1984).....21
United States v. Matlock, 415 U.S. 164
(1974).....8, 11, 12
United States v. Miller, 800 F.2d 129 (7th
Cir. 1986).....14
United States v. Nicoletti, 870 F. Supp. 96
(E.D. Penn. 1994).....18
United States v. Piet, 498 F.2d 178 (7th
Cir. 1974).....11

United States v. Rodriguez, 888 F.2d 519 (7th Cir. 1989).....12
United States v. Whitfield, 939 F.2d 1075 (D.C. Cir. 1991).....15, 16
Vickery v. Jones, 856 F.Supp. 265 (S.D. Ill. 1994).....18
Wilson v. Health & Hospital Corp. of Marion City, 620 F.2d 1201 (7th Cir. 1980).....10
Wong Sun v. United States, 371 U.S. 471 (1963).....21, 22
Young v. Chief of Police of Hometown, 1989 WL 157501 (N.D.Ill.).....19

Statutes and Rules

28 U.S.C. Sec. 1254(1).....2
28 U.S.C. Sec. 1331.....5
28 U.S.C. Sec. 1343.....5
42 U.S.C. Sec. 1983.....2, 5, 10
City of DeKalb - Municipal Code Chapter 24 (Building Code).....20, 21

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JACQUELINE J. MONTVILLE, *Petitioner*

v.

STAN LEWIS, KEITH SETCHELL, LANCE FARRIS, individually and in their official capacities as building inspectors/code enforcement officers, et. al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jacqueline J. Montville respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 87 F.3d 900. The opinion of the district court (App., *infra*, 1b-32b) is not reported in F.Supp. but is reported electronically at 1995 WL 530261 (N.D.Ill.).

JURISDICTION

The court of appeals entered its judgment on July 1, 1996, and issued its order denying rehearing on August 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT

Several city building inspectors twice entered the private home of Jacqueline Montville to determine whether renovations complied with local building ordinances. The first search, conducted without a warrant and pursuant only to the permission of only a workman in Montville's home, was conducted during the third visit to Montville's home to check on unrelated, alleged parking violations. Based on information gathered during the initial search, city officials procured an administrative warrant and subsequently searched Montville's home again. Montville filed suit under 42 U.S.C. Sec. 1983, alleging the Defendants violated her rights under the Fourth Amendment. The district court denied Defendants' summary judgment motion on the merits of the Fourth Amendment claim, and also rejected Defendants' claim to protection under qualified immunity. The Seventh Circuit Court of Appeals reversed, holding third-party consent law in the context of administrative searches is insufficiently clear and, therefore, Defendants search of Montville's home was reasonable.

A. Background

On September 14, 1993, several DeKalb, Illinois city

building inspectors investigated a complaint by Jacqueline Montville's neighbor about excessive parking in the common driveway. The visit to Montville's private residence followed at least two unannounced prior visits by an inspector looking for alleged parking violations, none of which were ever discovered.

When the inspectors arrived at the house on September 14, they observed a contractor's van parked in the driveway. The van's hood was raised and an extension cord ran from the van into Montville's house. The inspectors noted that the house had a seemingly new chimney stack, as well as what appeared to be a new side porch. Although city ordinances at the time did not require that building permits be displayed, the inspectors approached Montville's home to investigate. When the inspectors knocked on the front door, they were met by Dan Graham, a contractor who Montville had left in her home to lay tile while she was at her office for the day.

The inspectors, who did not identify themselves, asked Graham whether he had the required permits for his work. The contractor told the inspectors Montville owned the house, but the inspectors did not ask where she was or whether she had given Graham authority to allow people into the home, which she had not. The inspectors did not indicate to Graham that Montville had given them permission to enter her home. In fact, Montville had told the contractor that, if anyone came to the house, the contractor should send them to Montville's business office, where she was spending the afternoon. The inspectors did not give Montville prior notification of their visit. The inspectors had no warrant to search Montville's home, nor did they have Montville's consent. In fact, in previous interactions between Montville and city inspectors, Montville specifically declined to let inspectors enter her house without a warrant or her express permission. However, Graham,

concerned that the inspectors might "shut the job down," invited the inspectors into the house so that they could examine his work.

The inspectors entered the living room, where they observed a new fireplace and new electrical outlets, and then moved to the bathroom, where the contractor was installing tile. One of the inspectors asked the contractor whether a city electrical inspector could enter the house. The contractor assented. Before entering the house, the electrical inspector tested an electrical box on the outside wall next to the front door, to which he allegedly received an electrical jolt. He entered the living room, looked at the electrical outlets, and left the house.

Later that day, one of the inspectors, Stan Lewis, telephoned Montville to tell her about the inspection. He then sent her a letter detailing the building code violations observed, and informing her that the plumbing, electrical and fireplace work had been done without necessary permits and by a contractor who was neither licensed nor bonded as required by city building ordinances. The letter also indicated that another inspection would be required before the construction work was completed.

On September 16, Montville herself allowed another inspector, Keith Setchell, to enter her house to inspect the fireplace and chimney. Setchell approved the fireplace, but recommended that Montville brace the chimney stack extending from the roof. Thereafter, the City sent Montville a letter requesting a reinspection of her house on or before November 5. Montville replied with a letter questioning the authority for a reinspection, but failed to schedule a time for it.

The City then filed an affidavit and complaint for an administrative search warrant in the Circuit Court of DeKalb County. The affidavit, signed by Lewis, stated that he inspected the

exterior and interior of Montville's house on September 14, 1993, that he observed a number of building code violations, that the electrical inspector received an electrical jolt when he tested the electrical box next to the front door, that he unsuccessfully had attempted to arrange for a reinspection, which he believed was in violation of city codes. The court issued an administrative warrant authorizing a code inspection based on the Septembe. 14, 1993 search. The defendants executed the warrant on December 1, 1993.

B. Proceedings Below

Montville filed this suit against defendants in the United States District Court for the Northern District of Illinois, Western Division, alleging, *inter alia,* that the September 14 and December 1 searches of her house violated her Fourth Amendment rights. Jurisdiction in the district court arose under 42 U.S.C. Sec. 1983 and 28 U.S.C. Secs. 1331, 1343.

The Defendants moved for summary judgment, asserting that the searches were lawful and, in the alternative, that they were protected by qualified immunity. On August 16, 1995, the district court denied Defendants' summary judgment on the merits of the Fourth Amendment claim, and also denied qualified immunity. The court based its Fourth Amendment ruling largely on this Court's holding in Illinois v. Rodriguez, 497 U.S. 177 (1990), holding that it was unreasonable for the city inspectors to believe the contractor had the necessary authority to consent to a warrantless entry into the Plaintiff's home. The District Court also rejected Defendants' qualified immunity claim, holding that the law pertaining to administrative searches was clearly established as of September 14, 1993, the date of the initial search of Plaintiff's home.

On July 1, 1996, the Seventh Circuit Court of Appeals reversed. In a 2-1 split, the majority held that the defendants' conduct did not violate clearly established Fourth Amendment law and thus was shielded by qualified immunity. The majority held that third-party consent law in the context of administrative searches is scarce and unsettled and, therefore, Defendants were not sufficiently on notice that their conduct was illegal. The Seventh Circuit further held that the District Court erred in analogizing third-party consent in the police search context to the administrative context present in this case.

REASONS FOR GRANTING THE PETITION

This case provides a timely opportunity for this Court to clarify whether the ambiguous law of third-party consent in the context of administrative searches of homes or other private property should parallel the criteria for third-party consent in criminal law enforcement. There is a "relative paucity" of cases addressing this issue and that case law is not "sufficiently particularized." App., *infra*, 6a. Currently, administrative officers such as building inspectors, acting with full governmental police powers, may search homes and other private places without warrants, armed only with insufficient third-party consent. Similar acts by police officers would clearly violate the Fourth Amendment. These administrative officers, however, are presently sheltered by a qualified immunity analysis which requires that a plaintiff's rights be clearly established at the time the alleged violation occurred. In the instant case, the Seventh Circuit erred in providing qualified immunity to the Defendants because it improperly distinguished third-party consent given to police officers from third-party consent

given to other public officials; the diminished probable cause for administrative searches in some contexts, relied upon by the Seventh Circuit in making this distinction, is irrelevant to the law of third-party consent and creates a potentially devastating confusion to the law of searches under the Fourth Amendment.

The need for clear direction from this Court is especially pressing as an increasingly greater number of government regulations affecting property are being enforced by administrative agencies. This, in turn, is certain to lead to repeated conflicts between the power of administrative officers, acting under qualified immunity because of allegedly vague standards, and the property rights of citizens. Without clear guidance on this point, the Seventh Circuit majority has erroneously tolerated such an intrusion in this case.

I. The Court of Appeals for the Seventh Circuit, in misinterpreting established case law, erred in finding that building inspectors were entitled to qualified immunity from personal liability for their search of the plaintiff's home based on the third-party consent of a contractor who was not authorized to give such consent.

A. Fourth Amendment Applicability

The physical entry of the home by government officials is the chief evil against which the Fourth Amendment was designed to protect. Payton v. New York, 445 U.S. 573 (1980). This Court has repeatedly recognized that invasions of the home, including inspections by administrative officials, fall within the ambit of the Fourth Amendment. See Camara v. Municipal Court of the City and

County of San Francisco, 387 U.S. 523 (1967). In the case before this Court, the Seventh Circuit recognized that administrative inspections are searches and that "warrantless inspections of private property by municipal administrative officials without proper consent may be unconstitutional." App., *infra.*, 5a. The court even assumed "for the sake of argument" that a contractor's consent allowing city inspectors to search Plaintiff's home was not valid third-party consent. Id. The court further acknowledged that the issue of third-party consent to warrantless searches has been addressed by the Supreme Court. Id. citing United States v. Matlock, 415 U.S. 164 (1974) and Illinois v. Rodriguez, 497 U.S. 177 (1990).

However, the Seventh Circuit declined to apply this Court's Matlock and Rodriguez analyses to this home invasion case, distinguishing those third-party consent cases from this situation in that this Plaintiff was victimized by an "administrative" search rather than a "police" search. Seizing upon language that administrative searches are easier to secure than criminal search warrants, the court erroneously concluded that Fourth Amendment law was not sufficiently "clearly established" to give city inspectors proper guidance. App., *infra.*, 5, 6a. The Seventh Circuit bolstered this opinion, in part, with the fact that there exists a "relative paucity of cases addressing the issue of third party consent in the administrative inspection context . . .." Id. at 6a. That court reversed the District Court, holding that the city inspectors reasonably relied on what would have been inadequate third-party consent in the police context in conducting the searches in this case.

When government officials abuse power, actions for damages offer the only realistic avenue for vindication of constitutional guarantees. However, permitting damage suits against government officials can entail substantial social costs. These

conflicting concerns have been balanced by this Court by providing government officials performing discretionary functions with a qualified immunity. This shields them from civil liability as long as their actions are reasonable. Anderson v. Creighton, 483 U.S. 635 (1987). The qualified immunity issue presented here, however, is whether it was reasonable for housing code officers to believe, without inquiring further, that a workman temporarily on the premises had apparent authority to give consent for repeated inspections of a private home, despite the homeowner's actual and repeated denials of consent to search in the past. Under these circumstances, it was unreasonable for those government inspectors to believe that their conduct was lawful on September 14, 1993, the date of the initial search of Plaintiff's home.

Defendant building inspectors Lewis, Setchell and Farris entered Plaintiff's house, a private, single-family home used exclusively as a residence, on or about September 14, 1993, in violation of the Fourth Amendment. Some exigent circumstances, such as serious safety concerns prompted by fire, a threat to a person's safety, or some inherently dangerous activity, may require inspectors to immediately search a person's home without a proper warrant. Michigan v. Tyler, 436 U.S. 499, 509 (1978). But this was not an instance where police were searching for a criminal suspect, stolen property or evidence of a crime, nor were there any exigencies. "This was an administrative search for minor building code violations." App. *infra.*, 8a, (Manion, C.J., *dissenting*). The inspectors were simply "snoopy bureaucrats." Id.

Plaintiff had a reasonable expectation of privacy in her own home guaranteed by the Fourth Amendment. Katz v. United States, 389 U.S. 347 (1967). Historically, the sanctity of the home has been zealously protected, even to the point where this Court has held that

one has a reasonable expectation of privacy in a house destroyed by fire. Michigan v. Clifford, 464 U.S. 287 (1984). Administrative searches of a home are significant intrusions upon a person's Fourth Amendment rights. The Fourth Amendment safeguards the privacy, private property and security of even the most law-abiding citizens in avoiding arbitrary invasions by government officials, whether the officials are health, fire or building inspectors, and whether their purpose is to locate and abate a suspected public nuisance or simply to perform a routine, periodic inspection. Michigan v. Tyler, 436 U.S. 499 (1978). The possibility of criminal entry notwithstanding the guise of official sanction is a serious threat to personal and family security. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967). Thus, the importance of this constitutional issue is obvious, given the ease with which a housing code inspector armed with a complex municipal code can find a technical violation and the attendant potential for official harassment and violation of reasonable expectations of privacy.

B. Third-Party Consent

Generally, warrantless, nonconsensual administrative searches are unreasonable and are actionable under 42 U.S.C. Sec. 1983. Marshall v. Barlow's, 436 U.S. 307 (1978); Dow Chemical v. United States, 749 F.2d 307, 311 (6th Cir. 1984), aff'd, 476 U.S. 227 (1986); Wilson v. Health & Hospital Corp. of Marion City, 620 F.2d 1201, 1208 (7th Cir. 1980). An exception, however, permits authorities conducting a search to enter a dwelling without a warrant if they obtain voluntary consent either from the individual whose property is to be searched, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), from a third party possessing common authority or joint

control over the premises, United States v. Matlock, 415 U.S. 164 (1974), or an implied agency relationship, Stoner v. California, 376 U.S. 483 (1964). "Common authority," of course, rests on mutual use of the property and on generally having joint access or control for most purposes. At the very least, the third party's degree of control and authority must not be substantially inferior to that of the owner. Further, it is the government's burden to establish that common authority. United States v. Matlock, 415 U.S. 164 (1974). In Illinois, for example, courts have held that common authority typically arises from a marital or familial relationship or from a situation involving cohabitation. See People v. Steinberg, 260 Ill. App. 3d 365 (1994).

Prior to the decision in Illinois v. Rodriguez, 497 U.S. 177 (1990), courts relied on Stoner v. California, 376 U.S. 483 (1964) and Matlock in holding that there must be some basis for a belief that one who gives consent has been *authorized* to give consent to a search by reason of common use or implied agency. In Stoner, entry into a room to search based on the consent of a hotel clerk was held improper. In that case, relying on an agency theory, this Court found nothing to indicate that the police had any basis to believe that the night clerk had been authorized by the occupant of the room to permit the police to search the room. Thus, Stoner held that warrantless searches under the Fourth Amendment may only be authorized by those the state can show had apparent authority, just as it is the *government's* burden, generally, to show that a warrantless search is "reasonable" under the Fourth Amendment. United States v. Jeffers, 342 U.S. 48 (1951).

In United States v. Piet, 498 F.2d 178 (7th Cir. 1974), for example, the search of a warehouse was consented to in the owner's absence by a foreman who was in charge of the warehouse and who

had one of two keys to the warehouse. The foreman was held to have "common authority" to give valid consent. Cf. United States v. Baswell, 792 F. 2d 755 (8th Cir. 1986)(no valid third-party consent, at least under Matlock, because a maintenance man had neither common authority nor a right of mutual use; his access was for limited purposes only).

In the same vein, in United States v. Rodriguez, 888 F.2d 519 (7th Cir. 1989), a wife who had a key, a sign of actual authority, was held to have given valid consent to search a janitor's room where her husband worked. The court distinguished these facts from Chapman v. United States, 365 U.S. 610 (1961), which held that a landlord's authority over occupied property did *not* include authority to enter the premises to allow police to search. Again, in United States v. Harnae, 662 F. Supp. 766 (D. Colo. 1987), a real estate broker had apparent authority to consent to search of a home because the owner had moved out of the house and had entered into a listing agreement giving the broker permission to "open his home to outsiders." People v. Speer, 184 Ill. App. 3d 730 (1989), however, held that a social guest *lacked* authority to consent to a warrantless entry and search of another's home because he did not live at the apartment and there was no evidence that he was more than a social guest.

Thus, decisions prior to Illinois v.Rodriguez required some indicia of *actual authority*, a key, or an agreement between the agent and the principle, whether it be a maintenance agreement or a broker's listing agreement. Even under a pre-Rodriguez analysis, the facts in the instant case would not support a finding of valid consent. The workman who purportedly gave consent did not live in Plaintiff's house, he did not have a key, he did not have a "listing agreement" or a maintenance agreement, the homeowner had not

moved out of the house, there was no relationship between the workman and the plaintiff, and this was a private home, not a janitor's closet or a warehouse. Nonetheless, despite this clear law, the Seventh Circuit concluded the defendants were immune from suit for their illegal searches because, at the time the invasions of the Plaintiff's home took place, the law was not sufficiently particularized in the *administrative* search context. The court reached this inappropriate conclusion by relying on decisions providing that "administrative inspections at times are treated differently under the Fourth Amendment because of the lesser intrusion generally involved." App., *infra.*, 6a, citing Camara, 387 U.S. at 537; O'Connor v. Ortega, 480 U.S. 709, 722-23 (1987); Schaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988), and held that "[t]his difference in treatment counsels against the mechanical application of cases involving searches by law enforcement officers to cases involving administrative searches." App., *infra.*, 7a.

However, there clearly was no "lesser intrusion" here, and as noted by Circ. Judge Manion's dissent below, the decisions noting those occasional distinctions in the treatment of administrative searches do not justify the confusion and potential disintegration of personal and property rights by the Seventh Circuit's reversal of the District Court's proper application of Illinois v. Rodriguez, 497 U.S. 177 (1990) to this case. The Seventh Circuit majority "cannot explain how a lower threshold of probable cause [for administrative as compared to police searches] means that relevant Fourth Amendment law [in the area of third-party consent] was not 'clearly established' for these inspectors in this case. If anything, the presumption should be reversed: without reasonable belief of a crime or an emergency, government intrusion for routine matters is

even less justified, and the protections of qualified immunity should be even rarer." App., *infra.*, 9a, (Manion, C.J., dissenting).

Illinois v. Rodriguez, which was clearly controlling in the area relevant to *this* case by 1993, teaches that "*authorities* may not always accept a person's invitation to enter someone else's premises if the surrounding circumstances are such that a reasonable officer would not act until he had made further inquiry, even when the occupant says he lives there." App., *infra.*, 9a, (Manion, C.J., dissenting, citing Rodriguez, at 188-89)(emphasis added). It would be peculiar if not disingenuous to claim that "authorities" must somehow be construed as "police only." Thus, this case presents a situation where the impropriety of the consent given was obvious. The contractor told the inspectors he did *not* live there, and that Plaintiff owned the house, yet there was no inquiry made by these inspectors as to whether or not the workman had actual authority to consent to a search. To lawfully conclude that a third-party has apparent authority, a public official must look for indicia of actual authority. United States v. Estrada, 962 F.2d 733 (7th Cir. 1992), citing United States v. Miller, 800 F.2d 129 (7th Cir. 1986).

In People v. Kramer, 204 Ill. App. 3d 1011 (1990), for example, the Illinois court held that a landlord lacked either actual or apparent authority to consent to the search of a tenant's apartment even though the apartment arguably was abandoned by the tenant. For there to be apparent authority for consent Rodriguez, the court said the facts known to the officers must be sufficient to enable them to conclude that the consenter's right to occupy and use the premises at least approximates that of the owner. See also People v. Keith M., 255 Ill. App. 3d 1071 (1993).

C. Duty to Inquire Further

There is a duty to "inquire further when the facts are ambiguous regarding a third party's consent or authority to do so." App., *infra.*, 9a, (Manion, C.J. dissenting, citing United States v. Whitfield, 939 F.2d 1071, 1075 (D.C. Cir. 1991)). Here, the inspectors failed to discuss the alleged "parking complaints" with the Plaintiff or to warn her of their impending official visits. Id. In dealing with Graham, the workman on the premises, the inspectors did not tell him they had the Plaintiff's permission to enter her house, nor did they give Graham an opportunity to call the Plaintiff to ask whether he should admit the inspectors. Indeed, Graham clearly indicated that he only *worked* at the Plaintiff's house. "At best, the inspectors then faced an ambiguous situation: Does Graham have authority to consent to their inspection, or not? They should have at least asked . . .. It is not too high a standard to require of inspectors that, given these circumstances, they simply ask: 'Did the owner agree to let us come in?'" Id., at 9a, 10a. When one adds to this situation the fact that these inspectors knew or should have been on notice that Plaintiff would not consent due to her previous communications with the City of DeKalb and her prior refusal to consent to searches or inspections at her residence for alleged dog odors, it should be near impossible for a public officials to believe lawful third-party consent could be given under the circumstances before this Court.

Rodriguez, and all its progeny, repeatedly emphasize an officer's duty to inquire further when the facts are ambiguous regarding a third party's consent. If the public officials do not learn enough, or if the circumstances make it unclear whether the property about to be searched is subject to mutual use by the person giving

consent, then warrantless entry is unlawful. United States v. Whitfield, 939 F.2d 1075 (D.C. Cir. 1991)(quoting Rodriguez). Under Rodriguez, therefore, the searches of this Plaintiff's home were unlawful because the officers failed to make further inquiry of the workman and it was unreasonable for the officers to believe that he had apparent authority.

The police in United States v. Estrada, 962 F.2d 733 (7th Cir. 1992), for instance, did inquire adequately and obtained enough information during their encounter with the third-party to make a reasoned judgment about his authority to admit them into a hotel room. They checked hotel records to find that the room was rented to an Hispanic man and, when they went to the hotel room in the early morning hours, an Hispanic male opened the door and consented to the search. The person who had actually rented the room was present along with the third-party, saw the officers at the doorway, yet did not approach the doorway. He voiced no objection to the proposed entry and made no attempt to intercede in the exchange between the officers and the person consenting to the entry.

Ordinarily, however, it would not be reasonable for officers to believe every time someone invites them into a home they are authorized to do so. In Illinois, more than mere acquiescence to a claim of lawful authority must be shown to establish voluntary consent. See e.g. People v. Flagg, 217 Ill. App. 3d 655 (1991). "[E]ven when the invitation is accompanied by an explicit assertion that the [third party] lives there, if the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry," the search is illegal. Illinois v. Rodriguez, 497 U.S. 177 (1990). The officers must make further inquiry if the surrounding circumstances raise a question about that claim. People v. Kramer, 204 Ill. App. 3d 1011

(1990). In the absence of sufficient facts, officers have a duty to seek further information in order to determine whether they may reasonably infer that the third party has the necessary authority to consent to an entry or search of the premises. United States v. Estrada, 962 F.2d 733 (7th Cir. 1992). The inspectors were on reasonable notice that their conduct was unlawful. McDonald v. Haskins, 966 F.2d 292 (7th Cir. 1992). Therefore, the Defendants in this case were required to inquire further as to consent, even if the workman had represented that he lived in the residence, which he did not.

Given the facts known to the inspectors at the time, it was not reasonable for them to have believed that this workman had authority to consent to their entering Plaintiff's home to conduct a search. The inspectors had only viewed a van parked in Plaintiff's common driveway with an electrical cord running from the van into Plaintiff's house. Upon knocking at Plaintiff's door, Graham answered and identified himself to the inspectors as a contractor doing work in the bathroom. The inspectors did not ask Graham whether he had authority to consent to a search, nor did they inquire as to his relationship with Plaintiff's home beyond the work he was performing there. The District Court did not consider such circumstances sufficient to give rise to a reasonable belief that Graham had the authority to consent to a warrantless entry into Plaintiff's home. Therefore, that court properly denied Defendant's motion for summary judgment under Illinois v. Rodriguez, 497 U.S. 177 (1990).

D. Applicability of Analogous Law

There is no reason to not analogize third-party consent law

in the area of police searches to administrative searches. Authoritative case law in the area of third-party consent to administrative searches is indeed scant. However, qualified immunity is not inappropriate unless the very action in question actually has been held unlawful; but the lawfulness only must be apparent in the light of pre-existing law. Vickery v. Jones, 856 F.Supp. 265 (S.D. Ill. 1994). Analogous case law involving the sufficiency of third-parties, such as workmen, giving consent in the police context may establish with sufficient clarity that a reasonably competent administrative official could not have believed that the law allowed him to enter a private house based simply on a workman's invitation.

The District Court analogized this case to the situation in United States v. Nicoletti, 870 F. Supp. 96 (E.D. Penn. 1994), where it was held that no person of reasonable caution could have believed that a contractor hired by the building owner to remove pipe had the authority to consent to search the entire warehouse. While the facts of Nicoletti are not identical to those here, the situation in that case would seem an even more compelling basis for reasonable belief in a valid consent than the facts of this case. After all, Nicoletti involved the search of an unoccupied warehouse; in this situation, the search was of a private residence and greater protections should have been afforded.

The Seventh Circuit was in error declining to extend this Court's holding in Illinois v. Rodriguez to administrative cases because of the lesser burdens placed upon administrative searches in other contexts. In order to determine whether it was reasonable for the officers to be on notice that their conduct might be unlawful, the contours of the right must be sufficiently clear. In delimiting the contours of the right, however, the court will consider decisions in

closely analogous situations, regardless of whether they constitute binding or merely persuasive precedent. Reasonably diligent government officials will have known of decisions reasonably related to the situation at hand, and can be expected to mold their conduct accordingly. Lojuk v. Johnson, 770 F.2d. 619 (7th Cir. 1985). The Plaintiff need not direct the court to a case that is precisely on all fours, for the factual circumstances need not be identical to prior holdings. Rice v. Burks, 999 F.2d 1172 (7th Cir. 1993). Actually, an official is not entitled to qualified immunity at all if the constitutional violation is obvious. Kernats v. O'Sullivan, 35 F.3d 1171 (7th Cir. 1994). In the absence of controlling precedent, the question is whether there was such a clear trend in the case law that it can be said with fair assurance that the recognition by a controlling precedent of the right asserted was merely a question of time. Young v. Chief of Police of Hometown, (N.D. Ill. 1989).

In this present situation, there has been a clear directive from this Court. Public officials cannot accept every invitation into a premises even if the one greeting them asserts that he lives there. Numerous cases suggest that further inquiry is necessary. Illinois v. Rodriguez, 497 U.S. 177 (1990) ("[I]t would be superfluous to multiply these examples.").

II. No probable cause existed for Defendants to enter Plaintiff's home, either because of exigent circumstances or pursuant to a valid ordinance.

Although not addressed by the Seventh Circuit, the Defendants in this case lacked probable cause to enter Plaintiff's home. The Seventh Circuit majority ended its analysis with the

conclusion that the law regarding third-party consent in the administrative context was unclear and, therefore, favored the Defendants. As a result, the court cut short its analysis and did not address the second prong of the qualified immunity analysis -- namely, whether the Defendants' actions met probable cause standards in the first place. Nevertheless, there was no probable cause.

There was a clear Fourth Amendment violation when Inspector Farris tested an electrical outlet he observed from the sidewalk on the front of the house rather than merely inspecting without touching. Arizona v. Hicks, 480 U.S. 321 (1987). Defendants characterize this as "de minimis" and thus not a violation of the Fourth Amendment under Artes-Roy v. City of Aspen, 31 F.3d 958 (10th Cir. 1994). However, in Artes-Roy, the building code inspector only entered an enclosed front porch of the residence and only talked to the homeowner. He did not inspect. In this case, the outside electrical outlet was on the house itself, was not part of the "open fields" exception, Hester v. United States, 265 U.S. 57 (1924), or the plain-view exception, and was entitled to Fourth Amendment protections. United States v. Bensinger, 489 F.2d 865 (7th Cir. 1973).

The Defendants also claim authority to inspect based upon the DeKalb Municipal Code. They claim they were lawfully inside the residence of the Plaintiff based on the authority provided by that Code, which generally authorizes them to enter any building or structure in order to enforce its provisions. The City of DeKalb - Municipal Code Chapter 24 (Building Code) has adopted by reference the Eleventh Edition of the BOCA National Building Code / 1990, specifically:

> Section 115.4 "Right of Entry: In the discharge of duties, the code official or authorized representative shall have the authority to enter at any reasonable hour any building structure or premises in the jurisdiction to enforce provision of the code."

In Camara v. Municipal Court, 387 U.S. 523 (1967), the Court considered a similar municipal ordinance in San Francisco and held it unconstitutional because it authorized warrantless inspections. Illinois law is just as clear. In People v. Bessler, 191 Ill. App. 3d (1990), it was held objectively unreasonable for a housing code officer to rely upon a village ordinance which allowed warrantless administrative inspections on private residential property based on an ordinance substantially similar to the one held defective in Camara.

Because this initial search was illegal, of course, the information gleaned during this search cannot be used to establish probable cause for a subsequent warrant obtained in this case. Information gained through illegal means and used to secure a search warrant invalidates that warrant if that information was critical to establishing probable cause. United States v. Karo, 468 U.S. 705 (1984). Thus, the subsequent search is illegal as the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1921). A search warrant is lawful and independent of a prior illegal entry if the illegally obtained information (1) did not influence the decision of the officers to seek the warrant; and (2) did not affect the magistrate's decision to issue the warrant. Murray v. United States, 487 U.S. 533 (1988). If this test is not met, the not infrequent abuses of official power that might flow from relaxing probable

cause standards would leave law-abiding citizens and their property rights at the mercy of the whim or caprice of vast numbers of municipal officials. Wong Sun v. United States, 371 U.S. 471 (1963).

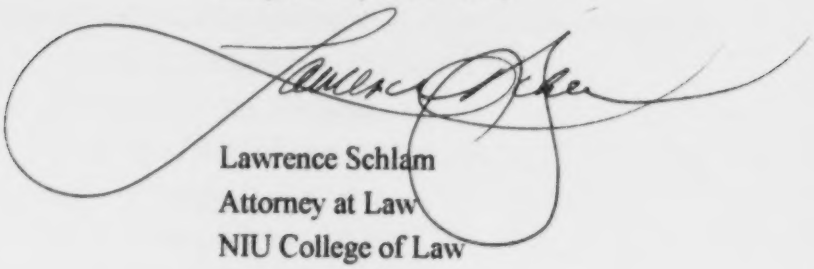
Probable cause in an administrative context presently may, in some situations, be judged by a lesser standard than that required in a criminal arrest, Marshall v. Barlow's Inc., 436 U.S. 307 (1978). It may be based *either* on specific evidence of an existing violation or on a showing that the inspection is being conducted pursuant to a general administrative plan for the enforcement of a neutral statute. Even if this is so, a lessor standard for probable cause in this case would be inappropriate. After all, at the time of the inspections, City of DeKalb Municipal Ordinance housing code violations were punishable by a term of incarceration for up to six months. DeKalb Municipal Ordinance Chapter 24.01. This transforms the ordinance into a criminal ordinance. For example, in Michigan v. Tyler, 436 U.S. 499 (1978), this Court held that entries to investigate the cause of a fire may be made under the warrant requirements governing administrative searches, but if the officers required further access to the premises to investigate whether arson has occurred, they are required to secure a search warrant supported by traditional probable cause applicable in criminal investigations. It is inconceivable, therefore, that municipal officials in 1993 should or would not have been aware of and been required to follow Tyler.

Consequently, the city inspectors in this case were neither cloaked in the protections of qualified immunity, because of the inadequate third-party consent of the contractor working at the Plaintiff's house, nor did they have sufficient probable cause to enter the Plaintiff's house without proper consent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Lawrence Schlam
Attorney at Law
NIU College of Law
DeKalb, Ill. 60115
(815) 753-0140
Counsel for Petitioner

October 1996

Jacqueline J. MONTVILLE, Plaintiff-Appellee,

v.

Stan LEWIS, Keith Setchell, Lance Farris, individually and in their official capacities as building inspectors/code enforcement officers, et al., Defendants-Appellants.

No. 95-3085.

United States Court of Appeals,

Seventh Circuit.

Argued Jan. 17, 1996.

Decided July 1, 1996.

Rehearing and Suggestion for Rehearing En Banc Denied Aug. 6, 1996.

Before BAUER, EASTERBROOK, and MANION, Circuit Judges.

BAUER, Circuit Judge. After a number of city building inspectors twice entered Jacqueline Montville's home to determine whether renovations complied with local building ordinances, she filed suit under 42 U.S.C. s 1983, claiming that the defendants had violated her rights under the Fourth Amendment.[1] The defendants moved for summary judgment, asserting that the inspectors lawfully entered Montville's home. In the alternative, the defendants contended that

---

[1] The complaint also asserted First and Fourteenth Amendment claims, as well as various state constitutional and common law claims, none of which is relevant here.

even if they had violated Montville's constitutional rights, they were entitled to qualified immunity from liability. The district court denied summary judgment on the merits of the Fourth Amendment claim, and also denied qualified immunity. We have jurisdiction over the defendants' qualified immunity appeal, see Edwards v. Cabrera, 58 F.3d 290, 292 (7th Cir.1995), and, finding that the defendants' conduct did not violate "clearly established law" and thus was shielded by qualified immunity, we reverse.

BACKGROUND

On September 14, 1993, several DeKalb, Illinois city building inspectors investigated a complaint by Montville's neighbor about excessive parking in the common driveway. When the inspectors arrived at the house, they observed a contractor's van parked in the driveway. The van's hood was raised, and an extension cord ran from the van into Montville's house. The inspectors noted that the house had a seemingly new chimney stack, as well as what appeared to be a new side porch. They knocked on the front door, and asked the contractor who answered whether he had the required permits for his work. The contractor, concerned that the inspectors might "shut the job down," invited the inspectors into the house so that they could examine his work. The inspectors entered the living room, where they observed a new fireplace and new electrical outlets, and then moved to the bathroom, where the contractor was installing tile. They stayed in the home less than five minutes. One of the inspectors asked the contractor whether a city electrical inspector could enter the house. The contractor assented. Before entering the house, the electrical inspector noticed what seemed to be a new electrical box on the outside wall next to the front door. When he tested the box to determine

whether it was wired properly, he received an electrical jolt. He entered the living room, looked at the electrical outlets, and left the house after approximately one minute. Later that day, one of the inspectors, Stan Lewis, telephoned Montville to tell her about the inspection. He then sent her a letter detailing the building code violations observed, and informing her that the plumbing, electrical and fireplace work had been done without necessary permits and by a contractor who was neither licensed nor bonded as required by city building ordinances. The letter also indicated that another inspection would be required before the construction work was completed.

On September 16, Montville herself allowed another inspector, Keith Setchell, to enter her house to inspect the fireplace and chimney. Setchell approved the fireplace, but recommended that Montville brace the chimney stack extending from the roof. Thereafter, the City sent Montville a letter requesting a reinspection of her house on or before November 5. Montville replied with a letter questioning the authority for a reinspection, but failed to schedule a time for it.

The City then filed an affidavit and complaint for an administrative search warrant in the Circuit Court of DeKalb County. The affidavit, signed by Lewis, stated that he inspected the exterior and interior of Montville's house on September 14, 1993 and that he observed a number of building code violations. Lewis' September 14 letter to Montville was attached as an exhibit to his affidavit. It detailed several code violations: installation of a fireplace without a permit and by an unlicensed, unbonded contractor; installation of electrical devices without a permit and by an unlicensed, unbonded contractor; performance of plumbing work in the bathroom without a permit and by an unlicensed, unbonded contractor; and remodelling of the porch without a permit. The letter also noted that the electrical inspector

received an electrical jolt when he tested the electrical box next to the front door, and advised Montville that she must take certain remedial measures and allow further inspections before the work was completed. Lewis' affidavit stated that he unsuccessfully had attempted to arrange for a reinspection. Finally, the affidavit stated that, based upon Lewis' experience as a code enforcement officer, his familiarity with Montville's house, and his prior observations and inspections, Montville's house was in substantial violation of the city building code, electrical regulations, plumbing regulations and mechanical regulations. The court issued an administrative warrant authorizing a code inspection limited to the areas and items complained of as being in violation of the city building code. The defendants executed the warrant on December 1, 1993.

Montville subsequently filed this suit against the defendants, alleging that the September 14 and December 1 searches of her house violated her Fourth Amendment rights. The defendants moved for summary judgment, asserting that the searches were lawful and, in the alternative, that they were protected by qualified immunity. The district court denied summary judgment on the merits of the Fourth Amendment claim, and also denied qualified immunity.

ANALYSIS

A. Standard of Review

The pertinent facts are undisputed. The dispositive issue, therefore, is whether the district court properly concluded as a matter of law that the defendants were not entitled to qualified immunity for the September 14 and December 1 searches of Montville's house. We review the district court's denial of qualified immunity de novo. Sherman v. Four County Counseling Center, 987 F.2d 397, 401 (7th

Cir.1993).

We have developed a two-prong analysis in qualified immunity cases. Id. We first determine whether the defendants' conduct violated the plaintiff's constitutional rights, and then, if so, whether those rights were clearly established at the time the violation occurred. Id. A negative answer to either prong settles the issue. At times it makes sense to address the second prong at the outset. For example, even if the searches of Montville's house did violate her Fourth Amendment rights, we nevertheless will reverse the district court's order denying the defendants' summary judgment motions if their conduct did not violate clearly established law as of September and December 1993.

B. Qualified Immunity

Administrative inspections are searches within the meaning of the Fourth Amendment, and therefore (with certain exceptions not relevant here) warrantless inspections of private property by municipal administrative officials without proper consent may be unconstitutional. See Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 528-29, 534, 87 S.Ct. 1727, 1730-31, 1733-34, 18 L.Ed.2d 930 (1967). It is undisputed that the inspectors entered Montville's house on September 14 without an administrative search warrant. The defendants contend that the search complied with the strictures of the Fourth Amendment because they had a reasonable basis for believing that the contractor had authority to consent to the search, even if he did not in fact have such authority. The district court, relying on Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), held that the contractor's consent was not valid third party consent and that the defendants were not entitled to qualified immunity for the illegal search. Even assuming for the sake of argument that the contractor's consent was not valid third

party consent, we cannot agree with the district court that the relevant law was "clearly established" at that time (or even now).

Certainly the issue of third party consent to warrantless searches has been addressed by the courts. See, e.g., United States v. Matlock, 415 U.S. 164, 177 n. 14, 94 S.Ct. 988, 996 n. 14, 39 L.Ed.2d 242 (1974) (police may conduct warrantless search with consent of third party possessing common authority or joint control over the premises); Rodriguez, 497 U.S. at 187, 110 S.Ct. at 2800-01 (police may conduct warrantless search with consent of individual with apparent authority to consent). And it is not necessary that Montville present a case "on all fours" with this case in order to meet her burden of showing that the law as to this issue was clearly established at the time of the search. Burns v. Reed, 44 F.3d 524, 527 (7th Cir.), cert. denied, --- U.S. ----, 115 S.Ct. 2583, 132 L.Ed.2d 832 (1995), citing Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). However, our review of the relevant case law (and indeed, the relative paucity of cases addressing the issue of third party consent in the administrative inspection context) indicates that the issue of third party consent to administrative inspections was not so "sufficiently particularized [as] to put [the] defendants on notice that their conduct [was] probably unlawful" in September 1993, when they entered Montville's house with the contractor's consent. Sherman, 987 F.2d at 401.

We agree with the district court that Rodriguez imposes on law enforcement officers a duty to inquire further as to a third party's authority to consent to a search if the surrounding circumstances make that person's authority questionable. See Rodriguez, 497 U.S. at 188-189, 110 S.Ct. at 2801-802. However, we disagree with the district court's conclusion that Rodriguez clearly established that the

inspectors in this case had that duty. Fourth Amendment analysis is fact-intensive, and there are numerous factual distinctions between this case and Rodriguez, the most significant of which is that the search here was not in furtherance of a criminal investigation, but was an administrative search to determine if construction work in Montville's house complied with local building codes and regulations. Although the warrant requirement applies equally in both contexts, administrative inspections at times are treated differently under the Fourth Amendment because of the lesser intrusion generally involved. See Camara, 387 U.S. at 537, 87 S.Ct. at 1735. For example, an administrative search does not require the same kind of "probable cause" required for a criminal search. See O'Connor v. Ortega, 480 U.S. 709, 722-23, 107 S.Ct. 1492, 1500-501, 94 L.Ed.2d 714 (1987). Instead, an administrative warrant can be issued "if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied." Id. at 723, 107 S.Ct. at 1500. See also Schaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309, 1318 (7th Cir.1988) ("A search conducted for civil or non-punitive purposes may be valid in circumstances where a search conducted as part of a criminal investigation would not be permissible.") This difference in treatment counsels against the mechanical application of cases involving searches by law enforcement officers to cases involving administrative searches. See Bolden v. Southeastern Pennsylvania Transp. Auth., 953 F.2d 807, 825 (3d Cir.1991), cert. denied, 504 U.S. 943, 112 S.Ct. 2281, 119 L.Ed.2d 206 (1992). In light of this, the defendants reasonably could have believed that Rodriguez's requirement of further inquiry did not apply to their administrative inspection of Montville's house. That is enough, we believe, to warrant qualified immunity.

The district court also denied the defendants qualified immunity as to Montville's claim that they improperly used tainted information gained during the allegedly unlawful September search to obtain the administrative warrant authorizing the December search. In light of our conclusion that qualified immunity was proper as to the September search, it necessarily follows that using information gained during that inspection was reasonable and did not violate clearly established law.

CONCLUSION

For the foregoing reasons, we reverse the order of the district court and remand to the district court for entry of judgment in accordance with this opinion.

REVERSED AND REMANDED.

MANION, Circuit Judge, dissenting.

Inspector Lewis came upon the Montville property in response to complaints about vehicles being parked in a common driveway. On previous occasions when driving by he saw no vehicles. But on September 14 he saw a van with "Homestead Chimney Services" inscribed on it. After further observing a shiny new chimney stack and an apparently new porch, but seeing no building permits, Lewis knocked on the door. Graham, the contractor, answered and immediately identified himself as a worker, not the owner. This should have halted any inspection of the house without the owner's permission or an explicit assertion from Graham that the owner had authorized him to allow in inspectors. But, with Graham's acquiescence, the

inspectors entered anyway.

As should be clear from the facts, the building inspectors illegally searched Montville's home. This is not a standard Fourth Amendment case in which police search for a criminal suspect, stolen property, or evidence of a crime. This was an administrative search for minor building code violations. If serious safety concerns are present--fire, someone's safety, some inherently dangerous activity--exigency may require inspectors to immediately search a person's home. See, e.g., Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 1950, 56 L.Ed.2d 486 (1978) (" ... in the regulatory field, our cases have recognized the importance of 'prompt inspections, even without a warrant, ... in emergency situations.' ") (quoting Camara v. Municipal Court, 387 U.S. 523, 539, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967); further citations omitted). But here the defendants are not firemen, and the neighborhood need not be cleared due to a gas leak. Rather, the inspectors are snoopy bureaucrats. Home searches are at the core of the Fourth Amendment. Where dangerous criminality is not at issue, the strictest protections should be observed. Because the inspectors did not have Montville's explicit approval to enter her home, or a valid search warrant issued by a judge with reasonable belief that Montville was violating the law, the Fourth Amendment prevents government officials from entering as defendants did.

The court concludes the defendants are qualifiedly immune from suit for the illegal searches because the law of third-party consent was not "sufficiently particularized" at the time of the inspections as to put the inspectors on notice that their searches broke the law. To so conclude, the panel relies on law that an administrative search warrant may be easier to secure than a criminal search warrant. Camara, 387 U.S. at 534-35, 87 S.Ct. at 1733-34. But the court cannot explain how a

lower threshold of probable cause means that relevant Fourth Amendment law was not "clearly established" for these inspectors in this case. If anything, the presumption should be reversed: without reasonable belief of a crime or an emergency, government intrusion for routine matters is even less justified, and the protections of qualified immunity should be even rarer.

From Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), we know that authorities may not always accept a person's invitation to enter someone else's premises if the surrounding circumstances are such that a reasonable officer would not act until he had made further inquiry, even when the occupant says he lives there. Id. at 188-89, 110 S.Ct. at 2801-02. Of course, Graham told them he did not live there. Interpretations of Rodriguez emphasize the duty to inquire further when the facts are ambiguous regarding a third party's consent or authority to do so. See, e.g., United States v. Whitfield, 939 F.2d 1071, 1075 (D.C.Cir.1991) (citing Rodriguez). Here, the inspectors never contacted Montville regarding the parking complaint or to warn her of their impending visits to her property. None of the inspectors indicated to Graham that they had Montville's permission to enter her house. They did not give Graham the opportunity to call Montville. When the inspectors sought entry to Montville's home, Graham told the defendants he was only working there. At best, the inspectors then faced an ambiguous situation: Does Graham have authority to consent to their inspection, or not? They should have at least asked.

The Fourth Amendment firmly establishes the sanctity of the home, both as a matter of private property rights and as a matter of privacy. See United States v. Brown, 79 F.3d 1499, 1508 (7th Cir.1996). It is not clear defendants can be deemed qualifiedly immune merely because

they engaged in an administrative rather than criminal search. Building inspectors deal with contractors daily. It is reasonable for inspectors to understand what "actual authority" is. It is not too high a standard to require of inspectors that, given these circumstances, they simply ask: "Did the owner agree to let us come in?"

Although I disagree with the court for letting the inspectors off the hook because they were qualifiedly immune, suffice it to say that the law is now clearly established. The next time curiosity gets the best of them when they drive by, the inspectors will need to obtain sufficient information to obtain a judicially authorized search warrant without first entering unlawfully for a quick look. For these reasons, I would affirm the district court's decision.

A true Copy:

Teste:

.....

Clerk of the United States Court of
Appeals for the Seventh Circuit

Jacqueline J. MONTVILLE, Plaintiff,

v.

CITY OF DEKALB, A Municipal Corporation and Stan Lewis, individually and in his official capacity as building inspector/code enforcement officer, Keith Setchell, individually and in his official capacity as building inspector/code enforcement officer, Lance Farris, individually and in his official capacity as building inspector/code enforcement officer, Richard Monas, individually and in his official capacity as director of building and community services, Pamela R. Boucher, individually and in her official capacity as assistant city attorney, Ronald Matekaitis, individually and in his official capacity as city attorney, Charles Cross, individually and in his official capacity as a police officer, Defendants.

No. 93 C 20247.

United States District Court, N.D. Illinois, Western Division.

Aug. 16, 1995.

Robert S. Wilson, Sycamore, IL, Jacqueline J. Montville, DeKalb, IL, for plaintiff.

Charles E. Hervas, James G. Sotos, Michael W. Condon, Michael D. Bersani, Margo L. Ely, Hervas, Sotos & Condon, P.C., Itasca, IL, for defendants.

MEMORANDUM OPINION AND ORDER

INTRODUCTION

REINHARD, District Judge.

Plaintiff, Jacqueline J. Montville, filed a twenty-nine count, second

amended complaint[1] against defendants, the City of DeKalb, Illinois (the City), Stan Lewis, Keith Setchell and Lance Farris, individually and in their official capacities as building inspector/code enforcement officers, Richard Monas, individually and in his official capacity as director of building and community services, Pamela R. Boucher, individually and in her official capacity as assistant city attorney, Ronald Matekaitis, individually and in his official capacity as city attorney, and Charles Kross[2], individually and in his official capacity as police officer.

Counts I - II are against the City, Lewis and Setchell, respectively, and seek damages pursuant to 42 U.S.C. s 1983 based on a search of plaintiff's home. Counts III - IV name the City, Lewis, Setchell and Farris, respectively, and allege a violation of 42 U.S.C. s 1983 based on a second search of plaintiff's home. Counts V - VIII parallel Counts I - IV as to defendants and allege a violation of Article I, section 6 of the Illinois Constitution. Counts IX - XII and Counts XIII - XVI parallel the first eight counts as to defendants and, respectively, seek damages for intrusion into seclusion and trespass under Illinois law. Counts XXV and XXVI[3] seek a

---

1

[1] This court, in an earlier order, dismissed various counts of plaintiff's thirty-eight count, first amended complaint with leave to file another amended complaint. See Montville v. City of DeKalb, No. 93 C 20247, 1994 U.S. Dist. LEXIS 11632 (N.D. Ill. Aug. 12, 1994).

2

[2] While the second amended complaint refers to "Cross," apparently that defendant spells his last name "Kross."

declaratory judgment, under the Fourteenth Amendment and Article 1, section 2 of the Illinois Constitution, respectively, that sections 111.1 and 104.1 of the City building code are constitutionally vague. Counts XXVII - XXX allege that the City (Counts XXVII, XXIX) and defendants, Monas, Setchell, Farris, Matekaitis, Lewis and Boucher (Counts XXVIII, XXX) violated 42 U.S.C. s 1983 and Article I, section 6 when they abusively searched plaintiff's residence pursuant to a search warrant.

Counts XXXI - XXXIV allege that the City (Counts XXXI, XXXIII) and Kross (Counts XXXII, XXXIV) denied plaintiff her right to free association under the First Amendment and Article I, section 5 of the Illinois Constitution when Kross prohibited a local news reporter from entering plaintiff's home during the search of December 1, 1993. Lastly, Counts XXXV - XXXVIII allege that the City and defendants, Lewis, Setchell, Farris, Monas, Matekaitis and Boucher denied plaintiff equal protection under the Fourteenth Amendment and Article I, section 2 of the Illinois Constitution when they impeded her rights under the First Amendment and Article I, sections 4 and 5 of the Illinois Constitution. All defendants have moved for summary judgment and have also sought sanctions against both plaintiff and her attorney under Fed.R.Civ.P. 11.[4]

FACTS

The following facts are taken from the parties' respective Local

---

[3] The second amended complaint does not contain any counts numbered XVII - XXIV. It jumps from Count XVI to Count XXV.

[4] The court will decide the Rule 11 motion in a separate order.

Rule 12 statements of fact to the extent they are supported by the record. Any disputed facts will be noted as discussed.

On September 14, 1993, plaintiff owned and occupied a home located at 515 Kendall in the City of DeKalb, Illinois. Prior to that date, Lewis, a city building inspector/code enforcement officer, had been made aware of complaints by the residents at 519 Kendall concerning vehicles being parked on a common driveway between plaintiff's home and the home at 519 Kendall. Pursuant to his duties as building inspector/code enforcement officer, Lewis, on several occasions prior to September 14, had driven by 515 and 519 Kendall but never observed any vehicles parked in the common driveway.

On September 14, 1993, Lewis, Setchell and Farris, while returning to their City offices from another assignment, drove by 515 and 519 Kendall to check the common driveway. In doing so, they observed a van parked in the common driveway and bearing the inscription "Homestead Chimney Services" (Homestead) on its sides. The hood of the van was raised, and an electrical cord ran from the van to the house at 515 Kendall. There was also a "shiny, new chimney stack" extending from the roof of 515 Kendall. There was also a side

porch which appeared to be new.[5] Because of the van and the new

---

5

5 In her Rule 12N response, plaintiff disputes this factual assertion by defendants by pointing to paragraph 33 of defendants' Rule 12M statement in which defendants assert that plaintiff hired James Hunt to build the side porch between 1988 and 1990. Paragraph 33, however, is not necessarily inconsistent with the assertion in paragraph 50 that the porch appeared to be new.

chimney stack, Lewis went to the front of 515 Kendall and looked for any permits displayed in the windows.

Having observed no permits, Lewis knocked on the front door of 515 Kendall. Dan Graham, Jr., an employee of Homestead answered the door. Lewis identified himself as a building inspector, and he and Setchell informed Graham that he needed a permit to install the fireplace and chimney and that he also needed to be licensed and bonded by the City. Setchell knew that neither Graham nor Homestead was licensed or bonded to perform mechanical work in the City. Graham told Lewis and Setchell that Homestead had installed the fireplace and chimney and that he was tiling the bathroom. Graham invited Lewis and Setchell into the house to show them he was only tiling the bathroom.

Lewis and Setchell, who had not previously entered the house at 515 Kendall, entered upon Graham's consent. Upon entering the house, Lewis and Setchell immediately observed a new fireplace in the living room and new electrical outlets adjacent to the fireplace.[6] Lewis told Graham that the fireplace would have to be "opened up" to see if a fire stop had been installed, but it was not opened up that day. Graham also escorted Lewis and Setchell into the bathroom. There was no sink or toilet in the bathroom, and Graham stated that Homestead was remodelling the bathroom. Lewis and Setchell entered only the living room and bathroom and were in the house

---

[6] While plaintiff disputes the assertion that there were new outlets adjacent to the fireplace, citing to her affidavit as support for the dispute, her affidavit does not contain such an assertion.

approximately one to five minutes.[7]

Lewis asked Graham whether Farris, the City electrical inspector, could enter the house, to which request Graham consented. Prior to entering the house, Farris had observed what appeared to be a new electrical box on the exterior of the house adjacent to the front door. Upon testing the electrical box to see if it was properly wired, Farris received an "electrical jolt." Farris entered the house, looked at the electrical outlets adjacent to the fireplace, and exited. He was in the house for approximately one minute.

Following the inspection, Lewis returned to his office, determined the owner of 515 Kendall to be plaintiff, telephoned plaintiff, informed her of the inspection and advised her he would be sending a letter in that regard. Prior to September 14, 1993, neither Lewis, Setchell nor Farris knew plaintiff or that she lived at 515 Kendall. Lewis subsequently gave plaintiff a letter, dated September 14, 1993, outlining the code violations observed, advising her that the plumbing, electrical and fireplace work had been performed without permits and by a non-licensed and non-bonded contractor and further noting that another inspection would be required before the work was completed. Plaintiff was never charged with any building code or ordinance violations related to the work done at her home.[8]

Subsequent to September 14, plaintiff hired a different contractor

---

7

[7] Plaintiff contends they were in the house one and a half hours, but the evidence does not bear out this assertion.

8

[8] The City did charge "Dan Graham" with three violations to which Dan Graham, Sr., the owner of Homestead, pled guilty.

to install the new toilet and sink in the bathroom. This contractor did not obtain a permit to do so. Further, on September 16, 1993, another heating contractor hired by plaintiff obtained a permit to complete the installation of the fireplace, and plaintiff consented to Setchell's entry into her house to inspect the fireplace and chimney. On September 16, Setchell approved the fireplace but recommended that the chimney stack protruding from the roof be braced. Plaintiff did not install the chimney stack brace until the summer of 1994.

On October 27, 1993, Boucher sent plaintiff a letter requesting a re-inspection of 515 Kendall at a mutually convenient date on or before November 5, 1993. After an exchange of letters between plaintiff and Boucher concerning the authority for such an inspection, plaintiff never responded further to the inspection request. On November 12, plaintiff filed a petition for temporary restraining order and a complaint for injunction in the Circuit Court of DeKalb County seeking to prevent the City from further searching her premises. Plaintiff was denied her relief in that regard.

On November 16, the City filed an affidavit and complaint for an administrative search warrant in the circuit court. Lewis signed the affidavit and complaint. The affidavit states, in relevant part, that Lewis inspected the exterior and interior of the 515 Kendall residence on September 14, 1993. Lewis further states in the affidavit that he observed certain conditions and violations of the building code, referring by way of specification to his September 14 letter to plaintiff which was attached to the affidavit as an exhibit. The letter to plaintiff identifies that a fireplace had been installed without a permit and by an unlicensed, unbonded contractor, that electrical devices were installed with no permit and by an unlicensed, unbonded

contractor, that Farris was "jolted" when he tested the electrical device, that plumbing work in the bathroom was done with no permit and by an unlicensed, unbonded contractor and that the porch was remodelled without a permit. The letter further identifies the remedial measures to be taken by plaintiff and states that further inspections would be required prior to the work being completed. The affidavit itself further states that numerous attempts to arrange for a reinspection proved to be fruitless. Lastly, Lewis states in the affidavit that he has reason to believe, based on his experience as a code enforcement officer, his familiarity with 515 Kendall and the prior inspections and observations, that the house was in substantial violation of the building code, electrical regulations, plumbing regulations and mechanical regulations.

Also at the hearing on the City's request for a search warrant, Matekaitis, the City's attorney, informed the judge that certain parts of the fireplace had been inspected and approved but that the electrical receptacle adjacent thereto and the bracing for the chimney stack had not been approved. Matekaitis did not know, as of the date the affidavit and complaint for search warrant was filed, that Setchell had inspected the fireplace on September 16, 1993. While plaintiff disputes that Matekaitis did not know of the September 16 inspection

on the date the affidavit and complaint were filed, relying on her affidavit, her affidavit merely states that after the search warrant was issued she heard Matekaitis state that he knew the fireplace had been inspected. Such a statement does not, of course, necessarily show that Matekaitis knew of the inspection on November 16, 1993, the date of filing.

The circuit court issued the search warrant which provides that the

affidavit and complaint states sufficient facts to show probable cause, authorizes a "code inspection" and allows the code enforcement department to request the assistance of any other City department or division if necessary. The warrant further states, in handwriting on the bottom, that the "[i]nspection shall be limited to the bathroom, porch, woodstove and vent areas and items complained of as being in violation of various provisions of the DeKalb municipal code and as set forth in plaintiff's affidavit and complaint for search warrant."

The warrant was executed at 515 Kendall on December 1, 1993. Defendants, Lewis, Setchell, Farris, Monas, Boucher and Kross were present. Also present at defendants' request were plaintiff's electrical contractor, Sherman Webb and his assistant. James Hunt, who performed the reconstruction of plaintiff's side porch, was also present, but the parties dispute at whose request. Present along with plaintiff, and at her request, were Corintha Ball, Jacqueline Schmack and Wesley Coates, all personal acquaintances of plaintiff, and plaintiff's attorney and his daughter. The attorney's daughter operated a video camera during the execution of the warrant. There is also evidence that a second police officer was present at the scene, at least initially.

Monas, Lewis and Farris entered the bathroom adjacent to the living room. Lewis opened and closed the bathtub faucet to see if it was securely mounted and had the proper air chambers installed. He also flushed the toilet and found what appeared to be an active leak in the cold water line.[9] Farris inserted a circuit tester in the

---

bathroom outlet to determine if the outlet was properly grounded. He also examined the bracket fixture on the wall to see if there was an outlet on it. The inspectors then exited the bathroom and reentered the living room.

Once in the living room, Farris circuit tested the outlet by the fireplace. These defendants then exited the house. Monas and Lewis inspected the porch, the chimney stack was inspected and defendants left.

Prior to the execution of the warrant on December 1, Corintha Ball, a friend of plaintiff's, contacted a local newspaper reporter, Sharon Emanuelson, regarding the upcoming search. Plaintiff was unaware of Emanuelson's attendance until the day of the search and did not request her presence at the search. On the day of the search, Emanuelson appeared at 515 Kendall and entered the entryway of the house. Kross, who recognized Emanuelson as a reporter, asked her to exit the house during the search, which she did. He did not ask her to leave the property altogether, however, and did not forbid her from conducting interviews. Emanuelson later published a story in the local newspaper regarding the search. While plaintiff did not request Emanuelson's presence, once she learned who she was she wanted her to stay to communicate the abusive and outrageous governmental conduct.

9

[9] Plaintiff disputes the fact that the line leaked and attributes the presence of water to an earlier watering of a plant near the toilet. Such dispute is not material to whether Lewis's examination of the toilet was reasonable and within the scope of the warrant.

Several of the people who attended the search testified at their depositions as to the nature of the search. Emanuelson overheard Kross saying that he had never seen the City go to this extreme before or have to go to such an extreme. Emanuelson characterized the scene as a "circus atmosphere" and that it might seem "somewhat outlandish." She explained that the "circus atmosphere" was attributable to the overwhelming presence of City officials combined with plaintiff's attorney's daughter walking around with a video camera and that it was "kind of humorous." Emanuelson also testified that while passersby might interpret the scene as serious or dangerous, she considered it circus-like.

Wesley Coats, another acquaintance of plaintiff present at the search, considered the search to have "verged on the area of intimidation" due to, in his opinion, the "inordinate" number of City vehicles present. He did not observe, however, any actual intimidation.

According to Corthina Ball, the City officials present at the search were "very stern faced" and Kross asked for her name. In doing so, he was not intimidating and was, in fact, a "nice man." She also pointed to the manner in which the inspection was conducted of the bathroom and that the inspectors were banging on the faucet's pipes or whatever and asking the electrician what was behind the walls. Ball also testified that plaintiff's attorney told Boucher that there would be no "general search" of the house. She also characterized Kross as being "courteous" when he told Emanuelson she could not enter the house. She observed one of the inspectors measuring how far apart the nails were on the porch. She also characterized Coates as seeming "very intimidated" based on his body language. Additionally, plaintiff's attorney refused the inspectors access to the

basement. Lastly, Ball characterized the entire inspection as "heavy handed."

Plaintiff characterized the search as "abusive." In that regard, she described the inspectors as having "the demeanor of an SS troop." She defined the term "SS troop" as "an officer who is conducting himself in a lawless manner and without respect for any individual rights or liberties of people." She could not, however, identify any specific conduct that led to her characterization other than a "collective behavior." Plaintiff was told by others present at the scene that one of the inspectors was pulling on the bathtub faucets. The faucets were, according to plaintiff, "loosened up" as a result but function properly. The bottom of the tub was also chipped, but plaintiff does not know by whom. She does not seek compensation for any alleged property damage in this suit. Plaintiff, because of the number of City vehicles in front of her house, believed the search was engineered to look like a drug bust.

The two provisions of the building code challenged by plaintiff as constitutionally vague provide:

"111.1 Application for Permit

11.1 When permit is required: It shall be unlawful to construct, enlarge, alter or demolish a structure, or change the occupancy of a building or structure requiring greater strength, exit or sanitary provisions, or to

change to another use, or to install or alter any equipment for which is provision is made or the installation of which is regulated by this code, without first filing an application with the code official in writing and

obtaining the required permit therefore, except that repairs, as defined in Section 104.0 and which do not involve any violation of

this code, shall be exempted from this provision.

Section 104. Repairs and Maintenance

104.1 Repairs: Application or notice to the code official is not required for ordinary repairs to structures, but such repairs shall not include the cutting away of any wall, partition or portion thereof, the removal or cutting of any structural beam or bearing support, or the removal or change of any required means of egress, or rearrangement of parts of a structure affecting the exit requirements, nor shall ordinary repairs include addition to, alteration of, replacement or relocation of any standpipe, water supply, sewer, drainage, drain leader, gas, soil, waste, vent or similar piping, electric wiring or mechanical or other work affecting public health or general safety."

CONTENTIONS

Defendants the City, Lewis, Setchell and Farris contend that summary judgment is proper as to Counts I - XVI because they had a reasonable basis to believe they had consent to search on September 14 via the third-party, Dan Graham, Jr. Alternatively, the individual defendants maintain they are qualifiedly immune because the law as to whether a contractor could consent to a building code inspection absent express authority of the homeowner was not clearly established as of September 14, 1993. Defendants further argue that plaintiff cannot recover as a matter of law on her claims that the two sections of the building code are vague because: (1) there is no actual case or controversy; (2) she has no standing to challenge these code provisions; and (3) those provisions are not constitutionally vague. Additionally, defendants contend the facts do not support a claim that the manner in which the December 1 search was performed was unreasonable. Similarly, defendants contend that

to the extent plaintiff claims there was no probable cause to support the warrant they are entitled to summary judgment based on the factual assertions contained in the
affidavit of Lewis submitted in support of the warrant application. Further, as to plaintiff's claim that the affidavit contains false assertions, defendants maintain that it does not and that there was adequate administrative probable cause to support issuance of the warrant. The individual defendants alternatively assert qualified immunity from any claims based on the issuance or execution of the warrant because they acted reasonably under the circumstances. Defendants also argue they are entitled to summary judgment on plaintiff's First Amendment, right-of-association claims because there is no evidence of any association between plaintiff and the reporter and because plaintiff lacks standing to assert the rights of the reporter. Lastly, defendants seek summary judgment on the equal protection claims, arguing that plaintiff's alleged class, persons seeking to exercise their First Amendment rights, is not cognizable for purposes of equal protection under either the Federal or state constitution.

Plaintiff responds that summary judgment is inappropriate as to Counts I - XVI because Graham did not have authority to consent to the search nor was it reasonable under the circumstances for defendants to believe he had such authority. Alternatively, plaintiff points to an additional Fourth Amendment violation based on the inspection of the electrical outlet on the front of the house without Graham's consent. Plaintiff also responds that qualified immunity is not available as to Counts I - XVI because the law regarding third-party consent was clearly established as of September 14, 1993. Plaintiff asserts she is entitled to declaratory relief as to the

building code sections challenged because there is a likelihood of future searches and inspections under these provisions and because the sections' use of the term "alter" is vague and gives a code enforcement officer unbridled discretion to inspect her home. Plaintiff further responds that the search pursuant to the warrant was, under these facts, unreasonable, that the affidavit was defective because it was not made under oath and fails to set forth facts based on personal knowledge rather than belief, that the affidavit lacks sufficient facts to establish probable cause, that the information which provided the basis for the warrant was obtained via the illegal search on September 14, 1993, that the warrant failed to state with particularity the places to be searched, and that the execution of the warrant was unreasonable and abusive. Plaintiff also responds that qualified immunity does not apply to the issuance or execution of the warrant as the law was clearly established in those regards. As to her right-of-association claims, plaintiff argues that once Emanuelson arrived at her house she associated herself with Emanuelson for the purpose of exposing defendants' conduct to the public. Additionally, she contends that summary judgment should be denied as to her equal protection claims because defendants selectively prosecuted her in retaliation for filing this suit. Finally, plaintiff contends the City is not entitled to summary judgment because there is evidence that the City failed to adequately train its building inspectors such that the City acted with deliberate indifference to her rights.

DISCUSSION

Summary judgment is proper only if the pleadings, depositions,

answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Cox v. Acme Health Serv., Inc., 55 F.3d 1304, 1308 (7th Cir. 1995). In determining the appropriateness of summary judgment, the court must view the evidence, and draw all reasonable inferences therefrom, in a light most favorable to the non-moving party. Id.

I. Consent to Search (Counts I - XVI)

The City, Lewis, Setchell and Farris contend they are entitled to summary judgment on the claims, Federal and state, constitutional and common law, based on the September 14, 1993, inspection because of the consent given by a third-party contractor. More specifically, they argue that while the contractor did not have actual consent they had a reasonable basis for believing that he did and, therefore, their entry was reasonable.

The bottom line in analyzing the constitutionality of any search is its reasonableness. Illinois v. Rodriquez, 497 U.S. 177, 183 (1990). In order to satisfy the reasonableness requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by government agents, whether the magistrate issuing a warrant, the police executing it, or the police conducting a search under one of the exceptions to the warrant requirement, is not that they always be correct, but that they always be reasonable. Id. 185-86. Furthermore, there are various factors that can make the search of one's house reasonable, one of which is consent. Id. at 183-84. In that regard, all the Fourth

Amendment requires is that the government agents act reasonably. Id. at 186. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe the person who has consented has the authority to do so than it is violated when they enter without a warrant because they reasonably
(though erroneously) believe they are in pursuit of a violent felon. Id. In other words, the inquiry is whether a person of reasonable caution would, based on the facts available to the officer at the time, be warranted in believing that the consenting party had authority over the premises. Id. at 188. If not, then the warrantless entry without further inquiry is unlawful unless authority actually exists. Id. at 188-89.

Hence, the dispositive question for purposes of defendants' motion for summary judgment as to the September 14 search is whether, under the facts known to the inspectors at the time, it was reasonable for them to have believed that Dan Graham had the authority to consent to their entering plaintiff's home and conducting a search.[10] The undisputed, material facts are that the inspectors viewed a work van parked in plaintiff's common driveway with an electrical cord running from the van into plaintiff's house. Upon knocking, Graham answered and identified himself as a

---

[10] At this point the court notes that it is irrelevant to plaintiff's claim that the inspectors did not look into any private places or personal belongings while in plaintiff's home. The home itself was private and, thus, triggered constitutional protection.

contractor doing work in the bathroom. The inspectors made no inquiry of Graham as to whether he had authority to consent or as to his relationship with plaintiff or to her home beyond his working there. The court does not consider such circumstances sufficient to give rise to a reasonable belief that Graham had the authority to consent to a warrantless entry into plaintiff's home.

While Fourth Amendment issues are particularly fact specific, the court's decision here is supported by United States v. Nicoletti, 870 F. Supp. 96 (E.D. Penn. 1994). In that case, a city pollution officer, in response to a complaint of asbestos being thrown out of the windows of an unoccupied warehouse, arrived at the warehouse and observed asbestos covered pipes being ejected from the building. Id. at 97. The officer was directed to a Mr. Huggins as the person in charge. Huggins was an independent contractor hired by the building owner to remove the pipe. Id. His truck was on the premises and had on it a legend which read "Raymond Huggins Scrap Iron and Metal Pick-Up." Huggins gave the officer oral permission to enter the warehouse. Id. Later, after cursorily inspecting the warehouse and determining the presence of friable asbestos, the control officer advised his supervisor of the situation. Sometime later that day, two FBI agents and two police officers, members of a joint environmental crimes unit, arrived on the scene. Id. One of the agents asked Huggins who was in charge and he replied that he was and that he had a key to the gate allowing him entry. Id. at 97-98. He further explained he was hired by an agent of the owner to remove pipe. He displayed the agent's business card. Neither the FBI agents, the police or the control officer made any effort to contact the owner. Id. at 98.

The court found that under these facts and circumstances no

person of reasonable caution could have believed that Huggins had the authority to consent to either search of the warehouse. Id. at 99. While the facts in Nicoletti are not exactly the same as those present here, they are more compelling for a conclusion of reasonable belief than the facts in this case. As such, the court considers the ruling in Nicoletti to be particularly persuasive. Therefore, the court denies summary judgment on this basis.[11]

II. Qualified Immunity (Counts I - XVI)

Under the qualified immunity doctrine, government officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Donovan v. City of Milwaukee, 17 F.3d 944, 947 (7th Cir. 1994). Qualified immunity, while categorized as a defense, is an immunity from suit. Id. Once a defendant has pleaded qualified immunity as a defense, a court, in considering a summary judgment motion, may first determine whether a constitutional violation has even occurred and then, if the answer is yes, then may decide whether the constitutional standards were clearly established at the

---

[11] The court finds no evidence to support defendants' theory of "implied authority" to consent. In fact, the undisputed evidence shows that plaintiff told Graham that if anyone came by the house that he should give her a call. The mere fact that Graham had access to the house and immediate and complete control of the living room and bathroom does not give rise to any implied authority. If that were the case, the exception would surely swallow the rule.

time in question. Id.

An objective test is employed in determining whether public officials are entitled to qualified immunity. Id. at 951. The right allegedly violated must have been clearly established in a particularized sense and the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. Id. Put another way, the touchstone of a qualified immunity inquiry is the clarity of the state of the law in relation to the defendant's conduct at the time the conduct occurred. Id.

The plaintiff bears the burden of establishing the evidence of a clearly-established right, but that burden does not require binding precedent from the Supreme Court or the Seventh Circuit. Id. at 951-52. Nor does the plaintiff have to direct the court to cases "on all fours" with the case at bar. Id. at 952. However, case law in a closely analogous area is crucial to permit the court to conclude that reasonably diligent officials would have known of the case law, related it to the situation at hand and molded their conduct accordingly. Id. Thus, the plaintiff bears a rather heavy burden because qualified immunity is designed to shield all but the plainly incompetent or those who knowingly violate the law. Id.

In the present case, the law pertaining to administrative searches was clearly established as of September 14, 1993. Likewise, the law of consent, and third- party consent in particular, was clearly established by that date. Indeed, it would be incredulous for defendants to argue that they did not know of the need for Graham to have either actual or apparent authority following the 1990 decision in Rodriquez. Accordingly, these four defendants cannot, based on qualified immunity, escape liability for their conduct of

entering plaintiff's home on September 14, 1993.[12]

III. Declaratory Relief (Counts XXV and XXVI)

Plaintiff has alleged in Counts XXV and XXVI that the term "alter" contained in sections 104.1 and 111.1 is vague under the Fourteenth Amendment and Article I, section 2 of the Illinois Constitution, respectively. The City seeks summary judgment on these two counts because plaintiff has never been prosecuted or threatened with prosecution under either section 104.1 or 111.1 and, therefore, there is no case or controversy and plaintiff lacks standing. Alternatively, the City maintains that the word "alter" is not constitutionally vague.

An ordinance is void for vagueness if its prohibitions are not clearly defined. Berg v. Health and Hosp. Corp. of Marion County, 865 F.2d 797, 805 (7th Cir. 1989). An ordinance must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so she may act accordingly. Id. Ordinances need

---

[12] Because the court denies summary judgment both on the merits and on the qualified immunity doctrine, it need not reach plaintiff's argument that Rodriquez and the third-party consent cases do not apply to her state invasion of privacy and trespass claims. The court would note, however, that while consent is indeed a defense to those claims as well, Rodriquez is not a pure consent case. Rather, the issue in Rodriquez arises under the Fourth Amendment and addresses the question of whether particular governmental conduct was reasonable under that amendment. Reasonableness is not a defense, however, to an invasion-of-privacy or trespass action.

not be, however, meticulously specific or mathematically precise. They are permitted flexibility and reasonable breadth. Id. Further, even an arguably general term is not vague if when read in the context of its particular ordinance it is not beyond the grasp of persons of ordinary intelligence. Id.

In this case, while the term "alter" is somewhat general, it is not vague when considered in the context in which it is used in each of the challenged sections. Section 104.1 excludes from ordinary repairs (which do not require application or notice to code officials) "alteration of * * * any standpipe, water supply, sewer, drainage, drain leader, gas, soil, waste, vent or similar piping, electric wiring or mechanical or other work affecting public health or general safety." The term "alter" is defined as "mak[ing] different without changing into something else." Webster's New Collegiate Dictionary at 34 (1977). With that rather straightforward definition in mind, the term "alteration" as used in section 104.1 is clear and well within the grasp of persons with ordinary intelligence.

Section 111.1 requires a permit to "alter * * * a structure." This usage is similarly clear and susceptible to ready understanding by persons of ordinary intelligence. Accordingly, because the court does not consider the term "alter" to be vague or to render sections 104.1 or 111.1 vague, it grants summary judgment in favor of the City on Counts XXV and XXVI. In doing so, the court does not reach the issue of whether there is an actual case or controversy or whether plaintiff has standing to bring those claims.

IV. Search Pursuant to Warrant

In Counts XXVII - XXX plaintiff claims that the search conducted

on December 1, 1993 pursuant to a warrant violated the Fourth Amendment (Counts XXVII and XXVIII) and Article I, section 6 of the Illinois Constitution (Counts XXIX and XXX). In each count plaintiff raises five separate theories of liability: (1) that Lewis made perjured statements in his affidavit indicating that an inspection of the fireplace was necessary for the safety of the neighborhood even though the fireplace had been inspected and approved earlier by Setchell; (2) that Boucher and Matekaitis advised and assisted Lewis to further make perjured statements that plumbing had been installed when Boucher knew that all that was done was that a bathtub and sink had been connected to the old plumbing; (3) that the search warrant was executed by Lewis, Farris, Setchell, Monas and Boucher in an abusive fashion; (4) that the complaint for search warrant was based on information obtained in the illegal searches of plaintiff's house on September 14, 1993; and (5) that the City failed to adequately train its employees (presumably related to searches) which resulted in their deliberate indifference to plaintiff's rights.[13]

A. Perjured Statements

A search pursuant to a search warrant may be void if the party

---

[13] While plaintiff contends in her response to the summary judgment motion that the affidavit for the warrant was defective because it was not made under oath and was not based on personal knowledge, this is a claim not raised in plaintiff's second amended complaint, and the court will give it no further consideration.

challenging it establishes that: (1) a factual statement made in an affidavit is false; (2) the affiant made the false statement either knowingly and intentionally or with reckless disregard for the truth; and (3) without the false statement, the remainder of the affidavit is insufficient to establish probable cause. United States v. McNeese, 901 F.2d 585, 593-94 (7th Cir. 1990) (citing Franks v. Delaware, 438 U.S. 154, 155-56 (1978)).

Applying this standard, the court finds that Lewis's statement that an inspection of the fireplace was necessary for neighborhood safety does not support a claim of a defective warrant. First, the stack on the chimney had remained unbraced after the initial inspections on September 14 and 16. Thus, there was some truth to Lewis's stating a need to have the fireplace further inspected. Second, the necessity of an inspection was more an expression of opinion than a statement of fact. Third, it cannot be said that Lewis's statement was intentionally and knowingly, or even recklessly, false in light of the continuing need for a chimney brace. Lastly, the affidavit was clearly sufficient to justify issuance of the warrant absent Lewis's statement about the fireplace.

As to Boucher's knowledge of the plumbing situation and her allowing Lewis to make a statement that the plumbing needed inspecting, that too is insufficient to set aside the warrant under Franks. There is no evidence that Boucher had the expertise to distinguish between plumbing and bathroom fixtures (if there is a distinction, see Webster's Third New International Dictionary, at 1743 (1986) (defining "plumbing" as the "pipes, fixtures, and other apparatus concerned in the introduction, distribution, and disposal of water in a building.")) such that her allowing Lewis to make his statement in the affidavit rendered that statement

knowingly and intentionally or recklessly false. Furthermore, Boucher's knowledge was derived from Graham, an unlicensed, unbonded contractor who failed to obtain the proper permits. It clearly was not unreasonable for Boucher or Lewis to not have relied on Graham's assertion that nothing other than the tub and sink had been replaced. The evidence simply does not support plaintiff's perjury claim as to the status of bathroom plumbing as conveyed by Lewis in his affidavit.

B. Abusive Execution of Search Warrant

Plaintiff points to statements by various witnesses present at the search on December 1, including herself, as evidence that the execution of the search warrant was abusive (unreasonable in Fourth Amendment parlance). This evidence, however, even when viewed in a light most favorable to plaintiff, simply does not rise to the level sufficient to submit to a jury. The fact that there were six city employees present for the inspection and that they were "stern faced," "intimidating" and looked like "SS troops," does not, without more, evidence an unreasonable execution of the warrant. At best, these are opinions and characterizations of plaintiff and her witnesses which are unsupported by the actual actions of defendants. None of the witnesses, when asked to do so in their depositions, could identify specific conduct, conversation or action by any of the city employees that supported their opinions or characterizations. Furthermore, the number of City officials present was not unreasonable. In fact, it would have been unreasonable not to have a police officer there to maintain order and a city attorney to insure proper execution of the warrant. The number of inspectors

present is also not unreasonable. Nor does the fact that some of the inspectors banged on the faucets and arguably chipped enamel off the bathtub evidence unreasonableness under the circumstances. The nature of the search called for a thorough examination of the bathroom's plumbing fixtures. While it is unfortunate that plaintiff may have suffered some slight property damage as a result, there is no evidence that the damage was excessive or disproportionate to the requirements of the search. The court grants summary judgment to defendants on the abusive search claim in Counts XXVII - XXX.[14]

C. Inadequate Training

There is also insufficient evidence of the City's alleged inadequate training to survive the summary judgment motion as to that claim. Mere evidence of a failure to comply with the law of searches (as to the September 14, 1993 search) does not alone show inadequate training. Furthermore, the evidence does not give rise to any reasonable inference that any defective or inadequate training was the result of a reckless disregard for plaintiff's rights. Consequently, the court grants defendants' summary judgment motion as to the

---

14

[14] While plaintiff describes the search as a "circus" atmosphere, her own witnesses, in part, attribute that to the people plaintiff herself invited to attend. Moreover, one witness testified that plaintiff's own lawyer's daughter added to the "circus" atmosphere by walking around with a video camera. Curiously, plaintiff has not submitted the videotape, if one exists, in evidence.

inadequate training claim in Counts XVII - XXX.

D. Information from September 14 Search

This leaves plaintiff's last claim as to the December 1 search, that the warrant was defective because it was based on information obtained from the warrantless search of September 14. Plaintiff's claim in this regard depends on a determination that the September 14 search was illegal. Defendants have sought, in their summary judgment motion, to justify the September 14 search on the basis of consent and also by arguing that there was sufficient probable cause to support the warrant. Neither argument, however, is directly responsive to plaintiff's claim that the warrant was based on tainted facts obtained during the warrantless search of September 14. Defendants' qualified immunity defense as to this claim also fails to encompass plaintiff's theory of liability. The contention that a reasonable building inspector would have believed there was probable cause to support the warrant does not rebut plaintiff's claim that the original warrantless search was unreasonable. Therefore, the court denies defendants' motion for summary judgment on that part of Counts XXVIII and XXX claiming the December 1 search was illegal because of the use of tainted information in obtaining the search warrant.[15] The court does grant

---

[15] Even though the court finds that defendants are not entitled to summary judgment as a matter of law, the ultimate question of whether the September 14 and December 1 searches were reasonable is a matter for trial.

summary judgment to the City on Counts XXVII and XIX in their entirety, however, as there are no allegations that the information obtained in the alleged illegal search was used in obtaining the search warrant pursuant to an official policy or custom of the City.

V. First Amendment - Freedom of Association (Counts XXI-XXXIV)

Plaintiff claims she was denied her First Amendment right of freedom of association when Kross prohibited Emanuelson, a newspaper reporter from entering her home during the search of December 1. Plaintiff does not contend that her right to enter into and maintain an intimate relationship with Emanuelson has been interfered with. Rather, she maintains that Kross denied her the right to associate for the purpose of conveying to the public the nature of the City's activities vis-a-vis the search of her home.

As noted in this court's earlier ruling on defendants' motion to dismiss, the Supreme Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment: speech, assembly, petition for the redress of grievances, and the exercise of religion. Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984). The ability and opportunity to combine with others to advance one's views is a powerful and practical means of ensuring the perpetuation of the freedoms the First Amendment guarantees to individuals as against the government. New York State Club Ass'n v. City of New York, 487 U.S. 1, 12 (1988). Like other rights of expression, the government can regulate association as long as the regulation does not affect more association than is necessary and furthers the government's

legitimate interests. Cf. Turner Broadcasting Sys. v. Federal Communications Comm'n, 114 S. Ct. 2445 (1994) (citing Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

In this case, plaintiff testified at her deposition that she did not know Emanuelson personally at the time of the search but she "may have heard of her." Corintha Ball, and not plaintiff, had asked Emanuelson to attend. Plaintiff stated in her affidavit that when she went outside Emanuelson came up to her and asked if she could go in. Plaintiff told Emanuelson she could enter her home. According to plaintiff, "Even though [she] had not called [Emanuelson] [she] wanted her to be there with [her] to help [her] communicate the abusive and outrageous governmental conduct [she] was being subjected to."

While seeking the assistance of a newspaper reporter to observe and convey to the public the events regarding the search of her home is likely covered by the freedom of association, plaintiff's evidence here fails to give rise to any reasonable inference that an association between herself and Emanuelson existed or was even attempted. Plaintiff had no idea that Emanuelson was present at her home on December 1 but for her fortuitously exiting her home and seeing Emanuelson. Such a happenstance and temporary contact is a very thin reed upon which to base a freedom of association claim. Furthermore, there is no evidence that plaintiff had any assurance from Emanuelson that Emanuelson would cooperate and do an expose on the search. In fact, plaintiff did not know whether Emanuelson was even there in her role as a reporter. Under the facts as established, plaintiff cannot succeed on her freedom of association claim, and the court accordingly grants summary judgment on Counts XXXI - XXXIV. See Hong v. Children's

Memorial Hosp., 993 F.2d 1257, 1261 n.2 (7th Cir. 1993) (summary judgment appropriate where non-movant has no "fighting chance" at trial.)

VI. Equal Protection (Counts XXXV - XXXVIII)

In Counts XXXV - XXXVIII plaintiff claims she was denied equal protection. In doing so, she alleges that the class to which she is a member is the class of persons exercising their rights under the First Amendment.

This court previously dismissed plaintiff's equal protection claims because she failed to allege membership in a class. Her response is to assert membership in a class of persons with First Amendment rights. This will not do. Such a class would theoretically include every citizen of this nation. It would allow for an equal protection claim to be brought every time someone alleges an infringement of their First Amendment rights. Moreover, plaintiff has not shown that the City or any of the individual defendants have treated her differently than any other person similarly situated. The court grants summary judgment in favor of defendants on Counts XXXV - XXXVIII.

CONCLUSION

For the foregoing reasons, the court denies defendants' motion for summary judgment as to Counts I - XVI, grants the motion as to Counts XXV and XXVI, denies the motion as to Counts XXVIII and XXX only to the extent those Counts are based on the allegations that the search warrant was defective because it was

based in part on information obtained from the September 14, 1993 search, grants the motion as to Counts XXVII and XIX, and grants the motion as to Counts XXXI - XXXVIII.

ENTER:

/s/ Philip G. Reinhard
Philip G. Reinhard, Judge
United States District Court

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 6, 1996

BEFORE

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. DANIEL A. MANION, District Judge

JACQUELINE J. MONTVILLE,	)	Appeal from the United
	)	States District Court
Plaintiff-Appellee,	)	for the Northern
	)	District of Illinois,
No. 95-3085 v.	)	Western Division,
	)	No. 93 C 20247
CITY OF DEKALB, etc., et. al.,	)	
	)	Philip G. Reinhard,
Defendants-Appellants,	)	Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny.

Therefore, the petition for rehearing with suggestion for rehearing en banc is hereby DENIED.